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No. 00-874

In the Supreme Court of the United States

MICHAEL S. MATTHEWS,
Petitioner,

v.

HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; and GWEN K. WEST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY AND INDEPENDENT WOMEN'S FORUM IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Center for Equal Opportunity ("CEO") and the Independent Women's Forum ("IWF") respectfully move for leave to file this brief *amici curiae* in support of Petitioner Michael S. Matthews.

The Petitioner has consented to the filing of this brief, and a copy of the letter of consent is being filed simultaneously with the Clerk of the Court. Counsel for Respondents has withheld consent and opposes the filing of this brief.

The Center for Equal Opportunity is a nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in a wide variety of civil rights cases, including *Rice v. Cayetano*, 528 U.S. 495 (2000), *Shaw v. Reno*, 509 U.S. 630 (1993), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

The Independent Women's Forum is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity.

CEO and IWF strongly condemn unlawful gender or race-based employment discrimination and thus have a substantial interest in the outcome of this case.

QUESTION PRESENTED

Under Title VII, is an employer liable when it concedes that unlawful discrimination was a motive in an adverse employment decision yet argues that other factors also motivated the employment decision, given that the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), states that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice?"

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF
REASONS FOR GRANTING THE WRIT 3

REASONS FOR GRANTING THE WRIT 4

I. THE DECISIONS BELOW MISSTATE THE LAW. 4

A. The Civil Rights Act Of 1991 Expressly States That Howard County's "Mixed Motive" Claim Is Not A Defense To Title VII Liability. 4

B. The Two Cases Relied Upon By The Courts Below Are Inapposite. 6

II. THE DECISIONS BELOW DEPART SIGNIFICANTLY FROM PRIOR JUDICIAL HOLDINGS AND CAST CONFUSION ON AN IMPORTANT FEDERAL QUESTION. ... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Estepp,
95 F.3d 312 (4th Cir. 1996). 3,7

Pennsylvania State Police v. Penn. Human Relations,
517 A.2d 1253 (Pa. 1986). 3,6

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775 (1989). 4,5

Texas v. Lesage,
528 U.S. 18, 120 S.Ct. 467 (1999). 4,7,8

Statutes and Rules

42 U.S.C. § 1983 3,4,7,8

42 U.S.C. § 2000e-5(g)(B) 5,6,7

42 U.S.C. § 2000e-2(m) ..... *passim*

Other

H.R. Report No. 102-40 (I),
reprinted in 1991 U.S.C.C.A.N. 549 6

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INTERESTS OF *AMICI CURIAE*[1]

The interests of the Center for Equal Opportunity and the Independent Women's Forum as *amici curiae* is set forth in the preceding motion for leave to file this brief.

[1] No party authored this brief in whole or in part or made monetary contributions to the preparation of this brief other than the *amici curiae*, its members and counsels.

STATEMENT OF THE CASE

Michael Matthews, a twenty-year veteran of the District of Columbia Police Department, submitted an employment application to the Howard County Police Department in 1995. Pet. App. 7a.

It is undisputed that the County's hiring process treated individuals differently based on race and sex. The hiring process included an interview. Women and minority applicants who received a score of two "excellents" in the interview advanced to the next step in the hiring process. White males, however, had to score three "excellents" to advance. Pet. App. 9a-10a.

Officer Matthews (and twenty-nine other white males) received only two "excellents" in the interview step and thus did not advanced. All non-white male individuals who scored only two "excellents" were advanced to the final step and three were hired. *Id.*

Officer Matthews filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), which found cause to believe that "minority and female candidates were treated more favorably than white male candidates." Pet. App. 10a. The EEOC and Howard County entered into a settlement, which required the County never again to use this hiring scheme. *Id.*

Howard County, however, refused to settle Officer Matthews' individual claim. Matthews thus filed an action in federal court under Title VII and other statutes, seeking compensatory and punitive damages, and declaratory and other relief. *Id.*

The District Court granted Howard County's motion to dismiss for failure to state a claim. Even if the hiring process were discriminatory, the court held, there can be no claim for damages in Title VII cases unless the plaintiff shows that he would in fact have been hired.

Because "it would be speculative to infer that plaintiff would have been hired but for the alleged discrimination," the court concluded that Matthews failed to state a claim under Title VII. Pet. App. 12a. The Fourth Circuit Court of Appeals affirmed in a *per curiam* disposition. Pet. App. 4a.

On November 29, 2000, Officer Matthews petitioned this Court for a writ of certiorari, suggesting that summary disposition may be appropriate.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Respondent Howard County concedes that it considered race as a factor in its hiring process but now seeks to avoid liability by arguing that Matthews would not have been hired anyhow for other reasons. The District Court accepted this argument, and the Court of Appeals affirmed.

The decisions below squarely contradict the Civil Rights Act of 1991. That Act states that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*." 42 U.S.C. § 2000e-2(m) (emphasis added).

The two cases cited by the courts below (*Pennsylvania State Police v. Penn. Human Relations*, 517 A.2d 1253 (Pa. 1986) and *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996)) are inapposite. *Pennsylvania State* predates the 1991 Act. *Alexander* concerns a case filed under 42 U.S.C. § 1983. The 1991 Act expressly amended Title VII so that section 1983 caselaw no longer applies. The district and circuit courts' reliance on these cases implies a misunderstanding of the 1991 Act.

The statement of law below departs significantly from prior judicial holdings and casts confusion on an important federal question, i.e., what elements must a plaintiff plead to state an employment discrimination case. Last Term, this Court granted *certiorari* and summarily remanded a discrimination case on the grounds that the circuit court improperly stated the elements a plaintiff must plead under section 1983. *Texas v. Lesage*, 528 U.S. 18, 120 S.Ct. 467 (1999). This Court likewise should grant this petition to correct the misstatements of law below regarding the elements of a Title VII case.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW MISSTATE THE LAW.

A. The Civil Rights Act Of 1991 Expressly States That Howard County's "Mixed Motive" Claim Is Not A Defense To Title VII Liability.

This is a "mixed motives" or "same decision" employment discrimination case analogous to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). Price Waterhouse argued that it should not be liable for sex-based employment discrimination because even absent discrimination, the plaintiff would not have been promoted for personality reasons. This Court, applying general principles of liability law, held that the defendant may avoid liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the plaintiff's protected class. *Id.*

Two years later, the Civil Rights Act of 1991 altered *Price Waterhouse's* ruling. The 1991 Act states:

> An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Officer Matthews thus stated a claim once he alleged that unlawful race-based considerations were a motivating factor in Howard County's decision not to hire him, even if the County would not have hired him for other reasons.

The 1991 Act, moreover, specifies the relief that plaintiffs like Matthews may obtain in mixed motive cases:

> [When] an individual proves a violation under section 2000e- 2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment....

42 U.S.C. § 2000e-5(g)(B). Assuming *arguendo* that Howard County proves its affirmative defense that Officer Matthews would not have been hired anyhow — a burden that Howard County must carry — he nonetheless would

remain entitled to declaratory relief, attorney's fees and costs.[2]

In short, "proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine *not the liability* for discriminatory practices, *but only the appropriate remedy*." H.R. Report No. 102-40 (I) at 48, *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (emphases both added and original). Officer Matthews thus stated a claim and is entitled to relief even if it would "be speculative to infer that plaintiff would have been hired but for the alleged discrimination."

B. The Two Cases Relied Upon By The Courts Below Are Inapposite.

The District Court cited only two cases in support of its holding. Pet. App. 12a. Both citations suggest that the District Court misunderstood the provisions of the 1991 Act. The court cited *Pennsylvania State Police v. Penn. Human Relations*, 517 A.2d 1253 (Pa. 1986), for the proposition that awarding reinstatement and back pay is inappropriate in mixed motive cases. *Pennsylvania State Police* predates the 1991 Act by five years. Indeed, the considerations of that case — i.e., that employers should not be forced to hire or reinstate an individual that they otherwise would not have hired and that back pay is inappropriate if the individual would not in fact have been hired — were incorporated by Congress into the clause (ii) *exceptions* of the 1991 Act. *See infra* 42 U.S.C. § 2000e-

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[2] Matthews requested injunctive relief, but the District Court held that no injunctive remedy was appropriate. Pet. App. 11a. *Amici* make no statement regarding whether appropriate injunctive relief could be fashioned.

5(g)(B)(ii). Matthews is not seeking (and under clause (ii) may not obtain) an order that he be hired. He is seeking only that to which he is entitled, namely the monetary, declaratory and other relief specified in clause (i).

The second case cited by the District Court (and the only case cited by the Court of Appeals), *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1996), is likewise inapposite. *Alexander* concerns a request for relief under 42 U.S.C. § 1983. Section 1983, unlike Title VII, allows "the government [to] avoid liability by proving that it would have made the same decision without the impermissible motive." *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467, 468 (1999) (*per curiam*). The 1991 Act makes clear that this is not the rule in Title VII cases. 42 U.S.C. § 2000e-2(m).

The use of these two cases below casts doubt on the district and circuit courts' understanding of the 1991 Act. Several cases decided under that Act clearly hold that a plaintiff establishes liability if he or she shows that unlawful race-based considerations played a role in the employment decision. *See* Pet. 8-9 (listing cases). The District Court overlooked these cases. The Court of Appeals' sole reliance on *Alexander* likewise implies that the appellate court may not have fully considered the 1991 Act's provisions.

II. THE DECISIONS BELOW DEPART SIGNIFICANTLY FROM PRIOR JUDICIAL HOLDINGS AND CAST CONFUSION ON AN IMPORTANT FEDERAL QUESTION.

Even though this Court typically does not grant petitions in cases that do not involve substantial conflicts among courts of appeals and state courts of last resort, this

Court's decision last Term to dispose summarily of *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467 (1999), counsels in favor of granting this petition.

Lesage concerned a section 1983 suit brought by an applicant denied admission to a state university. The admissions process was admittedly race-conscious, but the evidence showed that the applicant would not have been admitted even if race were not a consideration. The Court of Appeals ignored the latter factual conclusion, holding that a race-conscious admissions process raises a cognizable injury under section 1983 even if the government would have reached the same decision on non-race grounds. *Id.*

This Court reversed, holding that it has long been the rule in section 1983 cases that the government may defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. *Id.*

That, however, has not been the rule in Title VII cases since the 1991 Act. *Lesage* has apparently created confusion regarding this point. The reliance of the District Court and the Court of Appeals on a section 1983 case (*Alexander*) implies a mistaken belief that section 1983 caselaw governs Title VII cases. It does not.

The issues presented by this petition are at least as substantial as those presented by *Lesage*. There, as here, the court of appeals departed substantially from clearly established law to declare a new rule. There, as here, the new rule substantially affected one of this country's most important public policies – the strong federal interest in preventing unlawful discrimination.

In short, the same considerations that counseled granting the petition in *Lesage* argue for granting the petition in this case. And, as in *Lesage*, disposition of this case need not substantially burden this Court. Summary disposition, as Petitioner suggests, may be appropriate.

CONCLUSION

For the reasons stated herein and in the Petition for *Certiorari*, this Court should grant the Petition.

Respectfully submitted,
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